

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re:	No. C07-1472RSL
BROWN & COLE STORES, LLC,	Bankruptcy No. 06-13950SJS
Debtor,	Bankruptcy Appeal No. 07-S026
ASSOCIATED GROCERS, INC.,	
Appellant,	ORDER DENYING ASSOCIATED GROCERS, INC.'S EMERGENCY MOTION FOR STAY PENDING APPEAL
v.	
BROWN & COLE STORES, LLC; BROWN & COLE, INC.,	
Appellees.	

I. INTRODUCTION

This matter comes before the Court on the “Emergency Motion of Associated Grocers, Inc. For Stay Pending Appeal” (Dkt. #2). In its motion, Associated Grocers, Inc. (“Associated Grocers”) requests that this Court stay the “Order Granting Debtor’s Motion for Authority to Pay Remaining Balance Remaining in PACA Trust Account on DIP Loan” (hereinafter “Order Granting Motion for Authority to Pay”) entered on September 18, 2007 by the Honorable Samuel J. Steiner, United States Bankruptcy Judge for the Western District of Washington. See Dkt. #3 (Alston Decl.), Ex. 19; Dkt. #784 in C06-13950SJS. For the reasons stated below, the

1 Court denies Associated Grocers' emergency motion.<sup>1</sup>

## 2 II. DISCUSSION

### 3 A. Background

4 On November 7, 2006, Brown & Cole Stores, LLC, one of the largest privately-held  
5 retail grocery store chains in the Pacific Northwest, filed a motion in the United States  
6 Bankruptcy Court for the Western District of Washington for an order approving procedures for  
7 pre-petition claims under the Perishable Agricultural Commodities Act, 7 U.S.C. § 799 et seq.  
8 ("PACA"). See Dkt. #3, Ex. 2. On December 1, 2006, Judge Steiner granted the motion and  
9 his order outlined the approved procedures for administering PACA claims. Id., Ex. 4. On  
10 November 21, 2006, Associated Grocers filed a motion in Bankruptcy Court for the immediate  
11 turnover of PACA assets. Id., Ex. 3. By oral ruling on June 15, 2007, and later by written order  
12 on September 14, 2007, Judge Steiner denied Associated Grocers' motion for immediate  
13 turnover of PACA assets. See Dkt. #3 at ¶4; Ex. 18 (Order) at 2 (stating that Associated  
14 Grocers "does not hold a valid claim under [PACA] against the Debtor or any of the Debtor's  
15 assets or the assets of this bankruptcy estate.").

16 On August 22, 2007, Brown & Cole Stores, LLC filed a motion in Bankruptcy Court for  
17 authority to pay the balance remaining in the PACA trust to certain lenders. See Dkt. #6 (Alston  
18 Decl.), Ex. 1. On September 18, 2007, Judge Steiner conducted a hearing and entered the Order  
19 Granting Motion for Authority to Pay. See Dkt. 3, Ex. 19. Associated Grocers now requests  
20 that this Court stay Judge Steiner's September 18, 2007 order.

### 21 B. Analysis

22 Federal Rule of Bankruptcy Procedure 8005 states in part that "[a] motion for a stay of  
23 the . . . order . . . of a bankruptcy judge . . . must ordinarily be presented to the bankruptcy judge  
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25 <sup>1</sup> The parties have not requested oral argument under Local Civil Rule 7(b)(4). Accordingly,  
26 the Court decides this matter on the memoranda, declarations, and exhibits submitted by the parties.

1 in the first instance. . . . A motion for such relief, or for modification or termination of relief  
 2 granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate  
 3 panel, but the motion shall show why the relief, modification, or termination was not obtained  
 4 from the bankruptcy judge.” In this case, Associated Grocers admits that it did not present the  
 5 request for stay first to Judge Steiner as ordinarily required by Rule 8005. See Motion at 7. In  
 6 its motion, Associated Grocers explains that it did not present the motion for stay to Judge  
 7 Steiner because:

8       Here, it is certain that the Bankruptcy Judge would not grant a stay, so making the  
 9       request first in the Bankruptcy Court would have been futile. The Bankruptcy  
 10       Court stated that it would deny any motion for reconsideration and AG  
 11       [Associated Grocers] should not bother – even though AG has the right present  
 12       [sic] such as [sic] a motion.

13 Motion at 8. The Court does not find this argument persuasive.

14       First, the Order Granting Motion for Authority to Pay expressly states that “[t]he Debtor  
 15       is authorized to pay the balance remaining in its PACA Trust Account on its DIP Loan after ten  
 16       (10) calendar days following the date of entry of this Order unless a Notice of Appeal is filed  
 17       and the Court enters an Order granting a stay pending appeal.” Dkt. #3, Ex. 19 (emphasis  
 18       added). While Associated Grocers contends that attempting to obtain a stay from Judge Steiner  
 19       would have been futile based on Judge Steiner’s rulings at the September 18, 2007 hearing, the  
 20       Court finds that at the hearing Judge Steiner did not preclude the Bankruptcy Court from staying  
 21       the order. See Dkt. 33, Ex. 23 (September 18, 2007 Transcript of Proceedings before Judge  
 22       Steiner) at 5:5-8 (The Court: “Let me ask you, let’s say you file your notice of appeal within the  
 23       10 days and you move for a stay, and then the stay is granted on some basis. . . . [D]oesn’t that  
 24       accomplish your purpose?”).

25       Unlike the facts from In re Moreau, 135 B.R. 209, 212 (N.D.N.Y. 1992), a case cited by  
 26       Associated Grocers in support of its motion, there is no indication from the September 18, 2007  
 hearing or otherwise that Judge Steiner has a policy against staying his own orders. See Motion  
 at 7; In re Moreau, 135 B.R. at 212 (“Judge Mahoney’s apparent blanket policy against staying

1 his own orders would render futile an attempt to seek a stay in that court, and thus justifies  
2 Beneficial's motion in this court for a stay pending appeal."). And the facts here are  
3 distinguishable from the case cited by Associated Grocers, Tooke v. Sunshine Trust Mortgage  
4 Trust No. 86-225, 149 B.R. 687, 689 (M.D. Fla. 1992), where the court stated that appellants  
5 "may seek further relief within the thirty (30) day period from the United States District Court."  
6 (emphasis added). Unlike the order in Tooke, the Order Granting Motion for Authority to Pay  
7 did not expressly preclude the Bankruptcy Court from considering a stay.

8 Associated Grocers' argument that Judge Steiner's prospective denial of a motion for  
9 reconsideration shows that a motion for stay in Bankruptcy Court would have been futile is also  
10 unavailing. It is true that at the September 18, 2007 hearing Judge Steiner prospectively denied  
11 any motion for reconsideration of the Order Granting Motion for Authority to Pay. See Dkt. #3,  
12 Ex. 23 at 6:13-19 (The Court: "Well, I want to get this order entered one way or another. And  
13 let's just approach it from the point of view that the motion for reconsideration is denied." Mr.  
14 Cullen: "But I haven't made it yet." The Court: "I know, but if you do, it's denied." Mr.  
15 Cullen: "Okay."). But, the Bankruptcy Court's decision whether to reconsider an order on the  
16 merits is not the same as a determination to stay an order pending appeal. Compare In re Byrd,  
17 172 B.R. 970, 974 (Bankr. W.D. Wash. 1994) (stating the standard for stay), with In re Winders,  
18 202 B.R. 512, 517 (D. Kan. 1996) (discussing standards for motion for reconsideration); see,  
19 e.g., In re Zahn Farms, 206 B.R. 643, 645 (B.A.P. 2d Cir. 1997) (denying a motion for stay for  
20 failure to comply with Rule 8005 because the motion "ignores . . . that the standards governing  
21 requests for stay pending appeal are different from the standards governing requests for  
22 injunction."). Associated Grocers' failure to seek a stay from Judge Steiner "ha[s] denied this  
23 [Court] the benefit of the views of the Judge who is familiar with the issues pertaining to any  
24 purported emergency." In re Zahn Farms, 206 B.R. at 645. Furthermore, Associated Grocers'  
25 decision to forego a motion for stay in the Bankruptcy Court ignores the policy behind Rule  
26 8005. "[C]ase law indicates that stay of a final order is not to be granted lightly. In fact, the

1 Ninth Circuit Bankruptcy Appellate Panel has held that an appellate panel (or a district court  
2 sitting as such), by generally staying enforcement of a bankruptcy court judgment pending  
3 appeal, departs from the fundamental principles of appellate review and unnecessarily assumes  
4 responsibilities ordinarily reserved to the trial court, where the party requesting relief is not only  
5 unable to demonstrate any abuse of discretion by the trial judge, but also is unable even to show  
6 that issue of a stay pending appeal was presented to the trial judge.” In re Wilson, 53 B.R. 123,  
7 124 (D. Mont. 1985) (citing In re Wymer, 5 B.R. 802 (B.A.P. 9th Cir. 1980)).

### 8 III. CONCLUSION

9 Associated Grocers has failed to present a persuasive justification for its failure to  
10 comply with Federal Rule of Bankruptcy Procedure 8005 by first presenting the motion to stay  
11 to the Bankruptcy Court. Accordingly, the “Emergency Motion of Associated Grocers, Inc. For  
12 Stay Pending Appeal” (Dkt. #2) is DENIED.

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14 DATED this 27th day of September, 2007.

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17 Robert S. Lasnik  
18 United States District Judge  
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